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IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PACIFIC AMERICAN FISHERIES, INC., a corporation,  
*Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,  
*Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

---

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON. NORTHERN DIVISION  
HON. JOHN C. BOWEN, *U. S. District Judge*

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OPENING BRIEF OF APPELLANTS

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KERR, MCCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,*

*Pacific American Fisheries,  
Inc., a corporation, and  
Alaska Pacific Salmon Com-  
pany, a corporation.*

1309 Hoge Building,  
Seattle, Washington.

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August 9, 1943

Alaska Salmon Industry, Inc.  
(Ir:P:T:2, EAC-2)  
Victory and Withholding Tax

Commissioner of Internal Revenue  
Washington, D.C.

Dear Sir:

Reference is made to the formal ruling signed by Mr. T. Mooney, Deputy Commissioner, dated July 12, 1943, (Ir:P:T:2, EAC-2), addressed to Alaska Salmon Industry, Inc., in which it was generally ruled that the Alaska salmon cannery could make the withholding and Victory tax deductions from the wages of their employees on the basis of a miscellaneous payroll period at the end of the canning season when such wages for the entire season become due and payable.

In connection with this ruling, certain questions have arisen with respect to which we respectfully request a ruling.

1. Are board and room furnished by the Alaska salmon cannery to their employees in Alaska part of the total wages paid to such employees and therefore wages within the meaning of Section 2(a) of the Current Tax Payment Act of 1943 from which deductions are required to be made by the employers?

The Alaska salmon industry, due to its unique seasonal character, determined by the fact that the salmon are caught only when they are returning to fresh water streams to spawn has developed certain practices which are peculiar only to this industry. Since the spawning areas are located in isolated portions of Alaska, and since the spawning seasons occur in different areas in Alaska at different times during the summer months, it is necessary for the employers to

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transport their employees to these isolated points in Alaska where the canning plants are located. The great majority of the canning plants are located in areas which are populated only by native Indians or in very small villages. Therefore, the employers, in order to assure uninterrupted operation of the canning operations during the spawning season, provide board and room for their various employees. Board and room are furnished to the employees by the employer for his convenience in order to recruit employees and to provide living conditions which will satisfy the employees in order to facilitate the canning operations.

2. Are advancements which are made by the employers to employees during the salmon canning season, which have no relation to the hours of work, rates of wages and the wages actually earned, and which are deducted without interest or other charges from the wages due and paid at the end of the canning season, wages from which deductions must be made under the Current Tax Payment Act of 1943?

The wage contracts of the Alaska salmon canners with their various groups of employees, all provide that payment, except where an employee quits or is discharged during the season, is not due until the end of the canning season, although these contracts establish different bases for computation of wages. Some wages are computed on an hourly basis and others on monthly or seasonal bases.

The labor contract with the inside cannery workers requires the employer to make one and only one \$25.00 advancement during the canning season and also requires the employer to pay during the canning season, an allotment for dependents of the employee of \$50.00 per month. The monthly earnings of these workers exceeds \$100.00.

The contract with the fishermen requires the employer to pay advancements up to \$70.00 per month for dependents of the fishermen. The earnings of the fishermen run into thousands of dollars during the season.

All of the other labor contracts with other groups of employees do not have any provisions with respect to advance-



Commissioner of Internal Revenue

August 9, 1943

ments by the employer. It is, however, the general industry practice to make advancements at the request of the employees in irregular amounts but such amounts are always less than the assured earnings of each employee. These advancements are deducted by the employer from the amount of wages earned during the season and payable at the end of the season but no interest or other charges are assessed by the employer with respect to such advancements.

The amount of the advancements have no relation to the actual wages earned during a particular period. For example, the \$45.00 advancement required under the Inside Cannery workers labor contract does not represent any fixed percentage of wages earned during a particular period, such as a week or month or day. This example is true of all other advancements made to other employees. Therefore, it appears that the problem resolves into the question whether these advancements are in effect loans without interest and therefore not wages. In this connection, in view of the irregular amounts advanced, and the lack of relation of the amount of the advancement to the amount of wages earned at the time the advancement is made, a tremendous and complicated task of bookkeeping would be required to compute properly the amount of the deductions to be made from such advancements.

It is believed that the difference between the wages actually earned by the employees and the total amount of the advancements would in all cases be greater than the withholding deductions required to be made from the total amount of such wages.

3. Do your rulings in answer to the above two questions modify in any way the answers given in the above-mentioned ruling dated July 22, 1943?

It seems that the only possibility of a modification of the previous ruling would be a modification to the answer to Question No. 3 in the July 12 ruling resulting from a holding in answer to Question No. 2 above that advancements are wages subject to withholding at the time when the advancements are made, inasmuch as Questions No. 1 and No. 2 answered by the July 12, 1943 ruling refer only to the problem of determining whether the Victory Tax or the current

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Withholding tax deductions are applicable to miscellaneous payroll periods beginning before and after July 1, 1943, and do not refer to the amount or form of wages subject to the respective taxes. However, the Alaska salmon industry appears to consider the July 12 ruling both proper and practical, so that clarification of this point would be desirable.

The salmon packing season is now in progress so that these questions are of immediate concern to the employers. It is therefore respectfully requested that a prompt ruling be issued.

Very truly yours,

John W. MacVey

Attorney for Alaska Salmon Industry, Inc.  
Covington, Burling, Hublee, Achenon  
and Corb,

701 Union Trust Building  
Washington, D.C.

JW:hn

C O P Y

August 10, 1943

IT:P:T-2  
EAC-2

Mr. Joan I. MacVey,  
c/o Covington, Burling, Futlee  
Acheson and Thorb  
701 Union Trust Building  
Washington, D. C.

Sir:

Receipt is acknowledged of your letter of August 9, 1943, in which you refer to Bureau ruling of July 12, 1943, holding that the payroll period of Alaska cannery workers employed by the Alaska Salmon Industry, Inc., and paid only at the termination of the season's employment, is a miscellaneous payroll period within the meaning of section 1621 (b) of the Internal Revenue Code, and that the employer is required to deduct and withhold tax only at the end of the season when he makes payment of the wages to employees for such season's employment.

You now request a ruling with respect to three questions which have arisen in connection with the aforementioned ruling. These questions will be answered in the order presented.

Question 1. "Are board and room furnished by the Alaska salmon canners to their employees in Alaska part of the total wages paid to such employees and therefore wages within the meaning of Section 2(a) of the Current Tax Payment Act of 1943 from which deductions are required to be made by the employers?"

The information contained in your letter shows that because the canning plants are located in isolated points in Alaska, the employer is required, in order to recruit employees, to provide them with satisfactory living quarters and meals.

Section 404.15 of the regulations promulgated under the Current Tax Payment Act of 1943, contained in Treasury Decision 5277, approved June 28, 1943, provides among other things, that if a person receives as remuneration for services a salary and in addition thereto living quarters or meal, the value to such person of the quarters and meals so furnished shall be added to the remuneration otherwise paid for the purpose of determining the amount of wages subject to withholding, but if living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not

be included as wages subject to withholding. The Bureau holds that the test of "convenience of the employer" is satisfied if living quarters and meals are furnished to an employee, who because of the nature of his work, is required to reside on the premises in order properly to perform his duties.

Based upon the information submitted by you, it is the opinion of this office that the living quarters and meals furnished the employees referred to are "for the convenience of the employer", and it is held that the value thereof is not includible in wages for the purpose of withholding, and, therefore need not be considered in determining the amount of tax to be withheld from their wages.

Question 2. "Are advancements which are made by the employers to employees during the salmon canning season, which have no relation to the hours of work, rates of wages and the wages actually earned, and which are deducted without interest or other charges from the wages due and paid at the end of the canning season, wages from which deductions must be made under the Current Tax Payment Act of 1943?"

Inasmuch as the wage contracts of the Alaska salmon canners with their various groups of employees, all provide that payment, except where the employee quits or is discharged during the season, is not due until the end of the canning season, the season is considered to be the payroll period. Advances made to such employees during the season are considered to be in the nature of loans, and withholding of the tax is not required at the time the advances are made. The wages subject to withholding of the tax at the end of the season should include the advances made employees during the season.

Question 3. "Do your rulings in answer to the above two questions modify in any way the answers given in the above-mentioned ruling dated July 12, 1943?"

This ruling does not modify the prior ruling of July 12, 1943, referred to above.

Respectfully,

T. Mooney

Deputy Commissioner.

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UNITED STATES  
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FOR THE NINTH CIRCUIT

PACIFIC AMERICAN FISHERIES, INC., a corporation,  
*Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

—and—

ALASKA PACIFIC SALMON COMPANY, a corporation,  
*Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

No. 10395

UPON APPEALS FROM THE DISTRICT COURT OF THE  
UNITED STATES FOR THE WESTERN DISTRICT OF  
WASHINGTON. NORTHERN DIVISION

HON. JOHN C. BOWEN, *U. S. District Judge*

OPENING BRIEF OF APPELLANTS

**JURISDICTION**

Pacific American Fisheries, Inc., and Alaska Pacific Salmon Company, Appellants, operate salmon packing plants in remote locations in Alaska. They each paid social security taxes (old age benefits and unemployment insurance) on account of their 1937, 1938 and 1939 operations. These payments included

certain amounts computed upon the value of board and lodging furnished employees at the canneries in Alaska during the brief operation seasons. Claims were made for the refund of the taxes paid to the extent that they were computed and exacted upon the assumed value of the board and lodging so furnished. The claims having been rejected, actions to recover the several amounts were prosecuted in the District Court which denied recovery. From the judgments dismissing the actions, these appeals are prosecuted. The cases present a single question of law arising out of similar facts. As a matter of convenience, the two cases were tried together in the District Court and for the same reason are presented together in this Court.

Jurisdiction in the District Court is founded on Judicial Code, Section 24, amended-fifth.

Jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code amended.

### **STATEMENT OF ISSUES AS MADE BY PLEADINGS**

The complaint of Pacific American Fisheries, Inc., No. 396 in the District Court (transcript 2-9) sets out five separate causes of action. The formal allegations of the first cause of action are by reference incorporated into the second, third, fourth and fifth causes of action.

Paragraph I, first cause of action (transcript 2) alleges that the plaintiff, Pacific American Fisheries, Inc., is a Delaware corporation authorized to do business in the State of Washington and the Territory of



Alaska and contains formal allegations necessary to disclose its right to maintain an action against the United States on the claims asserted. The allegations of this paragraph are admitted by the defendant except the formal allegation in the nature of a conclusion that the "plaintiff is justly entitled to the amount herein claimed from the United States" (Transcript 10).

Paragraph II of the first cause of action alleges:

"In the years 1937, 1938, and 1939 plaintiff was engaged in the business of catching and packing salmon. In conducting such business during the operating seasons of said year, it (1\*) operated a number of canneries with necessary traps and floating equipment situated in remote or isolated locations in Southeastern Alaska, on Kodiak Island, along the Alaska Peninsula, and on Bristol Bay. Said canneries were operated only during the fishing season, covering a period of only a few weeks in the Bristol Bay area and not exceeding several months in the other districts depending upon the run of fish in the several districts in which said canneries were located. During the remainder of said years said canneries were closed down and for all practical purposes deserted except for a watchman left in charge of each.

"To operate said canneries efficiently or at all, it was necessary that the plaintiff in advance of the fishing and operating season transport practically all its help from Bellingham and Seattle, Washington, and from Portland, Oregon, to its several Alaska canneries and return them to the several ports of embarkation at the end of the fishing and operating season. During the

fishing and operating season, it was necessary that the plaintiff as a part of its operations furnish such employees with lodging and sustenance at the canneries at which they were employed, for otherwise no facilities for lodging and sustenance would have been available to them and it would have been impossible for plaintiff to have operated such canneries at all." (Transcript 3-4)

By its answer (transcript 10) the defendant denies this paragraph of the complaint for want of information.

Paragraph III of the first cause of action (transcript 4) alleges:

"During the fishing and operating season of 1937 the plaintiff so transported to and employed in its said Alaska canneries numerous workmen on account of which employment it became obligated to pay taxes under Title VIII of the Social Security Act. On October 30, 1937, the plaintiff filed with the Collector of Internal Revenue at Tacoma, Washington, its return (2) covering its 1937 operations, which return showed \$748,725.11 paid in cash for wages and \$140,954.50 as the estimated value of lodging and sustenance furnished to its Alaska employees during that season. A tax computed upon the aggregate of said two amounts (\$889,679.61) was paid to the Collector of Internal Revenue at Tacoma, Washington, by the plaintiff on October 30, 1937, in the sum of \$8,986.80, which payment included \$1,409.54, being 1% of said sum of \$140,954.50, the estimated value of such lodging and sustenance. Said sum of \$1,409.54 was paid in error in that the said estimated value of lodging and sustenance upon which that sum was



computed and paid as a tax was not wages nor taxable as wages; that on April 2, 1938, the plaintiff duly filed its claim with said Collector of Internal Revenue to whom said excess taxes were paid for the refund of the same and said claim was rejected in its entirety by the Commissioner of Internal Revenue on July 11, 1939; that said sum of \$1,409.54 with 6% interest thereon from said date of payment is justly owing to the plaintiff." (Transcript 4-5)

By its answer the defendant admits the allegations of this paragraph except that it denies that the sum of \$1,409.54 was paid in error by reason of the facts alleged and admitted (Transcript 10).

The second cause of action (Transcript 5-6) involves a claim for \$269.05 based upon a supplemental return covering certain additional 1937 employees not included in the return described in the first cause of action.

The third cause of action is identical except that it is a claim for \$1,417.57 covering 1938 operations (Transcript 6-7).

The fourth cause of action is a claim for \$57.26 arising out of a later return covering operations during the last quarter of 1938 (Transcript 7-8).

The fifth cause of action involves the claim of \$1,-290.86 arising out of the return covering the 1939 operations. The answers made to the second, third, fourth and fifth causes of action are identical with that made to the first cause of action (Transcript 11).

## STATEMENT OF EVIDENCE

Because the defendant formally denied paragraph II of the first cause of action, descriptive of the company's Alaska operations in 1937, 1938 and 1939, it became necessary to introduce evidence to establish the facts so alleged.

Russell Mowry was comptroller of Pacific American Fisheries, Inc., during the years 1937, 1938 and 1939, and as such official, was familiar with its operations during those years. He testified in detail relative to this company's several operations.

### ALITAK

Alitak is located on the southwestern tip of Kodiak Island and operated there during the years 1937, 1938 and 1939 (Transcript 5-8). There is nothing at Alitak but the cannery. It is a three-line cannery having a capacity of 100,000 or 125,000 cases. The operations in one year would be typical of the other two years. Alitak is about 60 miles west of Kodiak and probably 150 miles west of Seward. The Town of Kodiak is located on the other or northeastern end of Kodiak Island, but there are no means of communication between the two ends of the island. Alitak is about 150 miles from Cordova. During a representative year there are about 180 or 190 men employed at the Alitak cannery, 90% of whom come from Seattle. These men leave Seattle about the middle of April and come back about the middle or the end of September.

In 1937 Pacific American Fisheries, Inc., operated their own ocean-going vessels. Transportation was

furnished to the men as part of the operation. The men embarked at either Seattle or Bellingham and at the end of the season were discharged at Seattle or Bellingham. They were furnished board and lodging aboard ship (Transcript 61-63).

The fish packed at the Alitak cannery are obtained from traps, gill nets and seines. The daily operations are carried on at irregular hours during the height of the season. You never know when the seine boats are coming in, and you have to have the crews ready during practically the whole twenty-four hours to can fish. Bunk houses are provided and the men eat at mess houses. The bunk houses and mess houses are operated by the company and are located right at the cannery. The company operates its own mess houses and bunk houses at the cannery during the season as an operating necessity so that the meals and the men can dovetail with the operation. It would not be possible to efficiently operate the cannery at that remote place under any different arrangement. It would not be possible to operate the cannery leaving the men to provide for their own board and lodging. At Alitak the company has maintained a doctor due to the remoteness of the location. He is a strictly medical man and first-aid man to take care of injured and sick people. The reason for maintaining a licensed physician at Alitak is that the place is so isolated that there is no other doctor around there. It is the human thing to do and it is also necessary in relation to the efficiency of the operation. The operation as described in 1937 applies equally for the other two years (Transcript 64-66).

## KASAAN

In 1937 the company operated at Kasaan which is about 30 miles west of Ketchikan. It operated at the same location in 1938, but did not operate at Kasaan in 1939 (Transcript 58).

It would not be possible for the employees employed at Kasaan during the fishing season to live at Ketchikan. The average number of men employed is about 200. It is a relatively large operation. The length of the season at Kasaan and at other southeastern Alaska points differs somewhat from the length of the season at Bristol Bay or to the westward or on the Peninsula. The season at Kasaan starts a little later than it does to the westward and closes a few days later. The majority of men employed during the season at Kasaan come from Seattle. Extreme limits of the operating season is from about the 1st of April to the end of September. Board and lodging are furnished at Kasaan during the operating season substantially in the same manner and for the same reasons already described with reference to Alitak. What has been said about 1937 would apply equally in 1938 at Kasaan. The hours of operation at Kasaan are irregular for the same reasons. The source of supply at Kasaan is principally traps. The fish caught in the traps are brought from a distance of from 60 to 70 miles, and are brought in at irregular hours depending on tides, winds and storms. It is necessary to keep the crew constantly present at the cannery to meet conditions as they may exist from day to day. A first-aid man is maintained at Kasaan. The first-aid man is generally a medical student or an intern.



The close proximity of Ketchikan makes it unnecessary to maintain a doctor there (Transcript 66-69).

### **KING COVE AND SHUMAGIN OR SQUAW HARBOR**

The company operated at King Cove in 1937, 1938 and 1939. This cannery is located on the south side of the Alaska Peninsula about 100 miles east of Dutch Harbor and 250 miles west of Seward (Transcript 58).

The Shumagin cannery, also known as Squaw Harbor, was operated in 1937, 1938 and 1939. It is located in the Shumagin Islands about 50 miles east of the King Cove cannery. These two canneries, King Cove and Shumagin, are relatively close together out to the westward along the Alaska Peninsula. The King Cove cannery is on the mainland and the Shumagin cannery is in the Shumagin Islands. The nearest point of any consequence is Seward which is about 250 miles distant. There are no facilities available at King Cove or Shumagin for the housing and feeding of the employees during the season other than such mess houses and bunk houses as the company itself furnishes. Lodging and meals are furnished at these canneries during the season in substantially the same manner and for the same reasons as has already been described with reference to Alitak. A licensed physician is employed at Shumagin to take care of both canneries. The operating season is from the 1st of April to the middle of September. The fish are obtained from traps, gill nets and seines. The daily operation is irregular for the reasons already stated. The King Cove cannery has a larger capacity

than the Shumagin cannery. In a good year King Cove will pack an average of 175,000 cases and Shumagin probably 150,000. King Cove is probably the largest cannery in Alaska and Shumagin is larger than the average (Transcript 69-72).

### BRISTOL BAY CANNERIES

The company operated at Naknek on Bristol Bay in 1937, 1938 and 1939. It operated at Nornek on Bristol Bay in 1937 and in 1938, but not in 1939. The company operated at Nushagek on Bristol Bay in 1937 and in 1939, but not in 1938 (Transcript 59).

The three canneries on Bristol Bay are located relatively close to each other so that the operations at the three places are practically identical. Each cannery has a capacity around 125,000 cases a year. About 600 or 700 men are employed during the season at the three places, equally divided between the three canneries. The operating season on Bristol Bay differs from the operating season at the other locations already mentioned in that the fishing is done entirely by seine boats during a very short and intensive season. The pack is almost exclusively red salmon and the run of red salmon available for packing is ordinarily during the month of July only. There are no accommodations for lodging or sustenance other than the accommodations furnished by the company. Lodging and sustenance are furnished by the company for the same reasons already stated with reference to Alitak. The means of getting the men from and to the canneries are the same as already have been described. A licensed doctor at Nak-

nek also takes care of Nornek which is across the river. At Nushagek there is a first-aid man as the government has a hospital nearby (Transcript 72-73).

### **PETERSBURG**

The company operated at Petersburg in 1937 and in 1938, but did not operate there in 1939. Petersburg is about 60 miles north of Ketchikan in southeastern Alaska (Transcript 59-60).

The cannery is located in the Town of Petersburg which has about 1500 or 2000 people during the summer. The company maintains accommodations for lodging and feeding its employees at Petersburg as at the other canneries described and for the same reasons. The fish packed at Petersburg are obtained from traps and seines. Although Petersburg is an established community, the town is not big enough to accommodate the influx of cannery help during the cannery season. It is impossible for the local people to furnish food and lodgings, so as a practical matter, the company is confronted with the same situation as at a cannery further removed from an established settlement. You never know when the fish are coming in and you have to have the crew standing by (Transcript 75-77).

### **PORT MOLLER**

Port Moller is on the northwest side of the Alaska Peninsula about 200 miles east of Dutch Harbor. The company operated there in 1937, and 1939, but not in 1938 (Transcript 60).

Port Moller is about 400 miles from the Bristol Bay canneries described. This cannery produces about

25,000 cases per year and is a relatively small operation employing about 100 men. The season is a little bit longer than at Bristol Bay. The men get there about the 1st of June and leave around the end of August. The nearest permanent settlement is Dutch Harbor, 200 miles distant. There are no accommodations at Port Moller for the housing and feeding of men other than those furnished by the company itself, and the housing and sustenance are furnished the same as at Alitak and for the same reasons (Transcript 74-75).

## SPECIFICATIONS OF ERROR

In the case of *Pacific American Fisheries, Inc., a corporation, Plaintiff, v. United States of America, Defendant*, No. 396, in the District Court, the District Court erred:

### I.

In entering Findings of Fact (Transcript 12-18), Conclusions of Law (Transcript 18), and Judgment (Transcript 19), in favor of the defendant, and dismissing the complaint.

### II.

The Trial Court erred in failing to find that board and lodging furnished by Pacific American Fisheries, Inc., to its employees in Alaska during the operating seasons were furnished for the convenience of the employer and the value thereof, therefore, was not taxable as wages to its employees.



## ARGUMENT

The case presents for decision the single question whether the value of the board and lodging, furnished under the circumstances shown, to appellant's employees while in Alaska during the short annual operating season constitutes wages taxable for social security purposes. There is no controversy concerning the amount of the taxes so exacted and paid.

The Social Security Act of April 14, 1935, 49 Statutes, 602, provides for a system of old age benefits, unemployment compensation, etc.

Section 801 of that Act provides:

“\* \* \* There shall be levied, collected and paid upon the income of every individual a tax equal to the following percentage of the wages as defined in Section 811. \* \* \*”

Section 811 of the Act defines wages as follows:

“The term ‘wages’ means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.  
\* \* \*”

The quoted sections of the original Social Security Act became respectively Sections 1400 and 1426 of the Internal Revenue Code (Act of February 10, 1939, 53 Statutes, 1).

Section 808 of the original Act of April 14, 1935, makes the Commissioner of Internal Revenue its administrator with power to make and publish rules and regulations for the enforcement of the Act, and Section 3901 of the Internal Revenue Code provides that the Commissioner of Internal Revenue, “shall have general superintendence of the assessment and col-

lection of all taxes imposed by any law providing for internal revenue."

Section 1400 of the Internal Revenue Code provides that the taxes to be collected to provide the funds to make social security benefits available, shall be levied *upon the income* of every individual, etc. This phraseology had been carried forward into the Internal Revenue Code from prior revenue acts reaching back at least as early as income tax of 1918 which defined gross income as:

"\* \* \* income derived from salaries, wages or compensation for personal service \* \* \* of whatever kind and in whatever form paid." 40 Statute 1057, Section 213, p. 1065

In the meantime and prior to the passage of the Social Security Act in 1935, this definition of wages as income had been given meaning by the Internal Revenue Department.

The Commissioner of Internal Revenue is the executive officer charged with the administration of these Federal tax laws, and hence his decisions are binding on the Federal courts unless clearly erroneous.

As early as 1921, fourteen years prior to the passage of the Social Security Act in 1935, the Commissioner, by Office Decision 814, determined that:

"Where, from the location and nature of work, it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer, the value of such lodging and sustenance may be considered as being furnished for the convenience of the employer and need not, therefore, be included in computing net income of the employees."

This was the settled meaning of the word "wages" in the fishing industry when Congress, in passing the Social Security Act in 1935, defined "wages" as follows:

"The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash  
\* \* \*."

This situation makes applicable two elementary rules of statutory construction:

1. When a definition or provision having a well settled meaning under an earlier statute is carried forward into a later statute, it is given the same construction in the later statute that it had in the earlier statute from which it was taken.

2. The interpretation placed on a statute by the chief executive officer charged with its administration is binding on the courts unless clearly erroneous.

While these rules are so elementary that it seems hardly necessary to cite authorities, a reference to the following may not be out of place:

*Southern Pacific Company v. Lowe*, 247 U.S. 330;

*Maryland Casualty Company v. United States*, 251 U.S. 342;

59 C.J., "Statutes," 1064, §626.

In the *Southern Pacific Company* case, involving an income tax question, the court said (page 335):

"Certainly the term 'income' has no broader meaning in the 1913 act than in that of 1909 \* \* \* and for the present purpose we assume that there is no difference in its meaning as used in the two acts."

In the *Maryland Casualty Company* case the court held that the term income "received" had the same meaning in an act of 1913 as it had in an earlier act of 1909.

"The reenactment of a statute, or the passage of a similar one, in the same or substantially the same terms, after it has received a practical construction by the executive or administrative departments of the government, or by the legislature itself, is an adoption of such construction, or is, at least, highly persuasive, especially where the original statute has been repeatedly reenacted since its executive construction; *and a subsequent executive construction, contrary to the original one, is not entitled to weight.*" 59 C.J. 1064, §626 (Italics supplied)

Congress is presumed to have known how the term "wages" had been construed and interpreted by the Commissioner for the purpose of administering the income tax laws over a long period of years, and if Congress in passing the Social Security Act in 1935 had intended to give that term a different meaning or application, presumably it would have used language to express that different intent. When Congress carried forward into the later statute substantially the same definition that appeared in the earlier statute, it must be assumed that for administrative purposes it intended the term should have the same meaning in both statutes.

On March 22, 1940, the present Commissioner of Internal Revenue restated the ruling of his predecessor in Mimeograph 5023, Internal Revenue Bulletin No. 16, 1940, page 2, as follows:



“\* \* \* For further examples of circumstances under which it has been held that quarters were furnished for the convenience of the employer and the value thereof need not be included in the gross income of the employees, see O. D. 814 (C.B. 4, 84 (1921) ), relating to fishermen and cannery \* \* \*.”

and further stated that:

“\* \* \* it is necessary that employees engaged in fishing and canning be furnished with lodging and sustenance by the employer \* \* \* for the convenience of the employer \* \* \*.”

In 1935 the Congress passed the Social Security Act and, in determining the yardstick by which the amount of tax should be computed with respect to wages, it used almost the identical words appearing in the Income Tax Acts effective continuously for some 17 years prior thereto. The Commissioner in 1921 determined the meaning of the word *wages*; and the present Commissioner adopted that interpretation in 1940.

The Social Security Act follows the Income Tax Regulations in providing that traveling expenses do not constitute taxable income (SS.T. 28 (C.B. XV-2, 397 (1936) ). The following is quoted from Income Tax Regulations 103 (Sec. 19.23 (a)-2):

“Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, *the reasonable and necessary* traveling expenses, *meals,*

*and lodging are business expenses.*" (Italics supplied)

"(a) If, then, an individual, whose business requires him to travel, receives a salary as full compensation for his services, without reimbursement for traveling expenses, or is employed on a commission basis with no expense allowance, his traveling expenses, including the entire amount expended for meals and lodging, are deductible from gross income.

"(b) If an individual receives a salary and is also repaid his actual traveling expenses, he shall include in gross income the amount so repaid and may deduct such expenses."

Among the exclusions from wages appears the following, S.S.T. 383 (C.B. 1940-1, page 210):

"Amounts paid by the M Baseball Club to cover transportation, room, and board of its players while in training and while away from its home grounds do not constitute 'wages' within the meaning of the Federal Insurance Contributions Act.

"The question is presented whether certain amounts paid by the M Baseball Club to cover expenses of its players constitute 'wages' within the meaning of the Federal Insurance Contributions Act.

"During the period of approximately four weeks when the players of the M Baseball Club are at the training camp preparing for the regular baseball season, they receive no remuneration since their salaries are payable only for services performed during the actual playing season. The Club furnishes the players railroad transportation from their homes to the training camp. While in training the players stay at a designated hotel and their meals are furnished by the hotel or by

some restaurant where an account has been established by the club, which pays the expenses in question and carried them on its books as 'training and travel expense.' The club also pays such expenses of the players under the contract during the season, when the team is playing away from its home grounds, but otherwise the players pay their own living expenses.

"It is held that the amounts paid by the M Baseball Club to cover transportation, room, and board of its players under the circumstances stated do not constitute 'wages' within the meaning of the Federal Insurance Contributions Act. (See Article 16(c), Regulations 91.)

"THE CONCLUSION REACHED HEREIN IS APPLICABLE ALSO UNDER THE FEDERAL UNEMPLOYMENT TAX ACT AND UNDER TITLES VIII AND IX OF THE SOCIAL SECURITY ACT."

The fishing season covers a period of only a very few months during the year. The balance of the year is spent by these employees elsewhere. Lodging and sustenance in Alaska are furnished to cannery workers for the same reason that any employee required to travel in the performance of his duties, such as baseball players, traveling salesmen, buyers for department stores, professional men, etc., are furnished transportation, lodging and sustenance while traveling.

The evidence discloses that at these remote and isolated locations in Alaska it is the common practice for the employer to furnish not only lodging and sustenance but medical aid as well. If the operation is not large enough to justify a regularly licensed

physician, then a pharmacist or other person capable of furnishing first aid is made available. This medical service is furnished by the employer in part for humanitarian reasons, but more particularly for the convenience of the employer in order to promote efficiency of the operation. There is no more reason for regarding lodging and sustenance furnished for that same reason as wages than there is for regarding first aid medical services as wages.

If, as the Commissioner has authoritatively ruled, the value of lodging and meals furnished to professional ball players in training in Florida or elsewhere is not taxable wages for either income tax purposes or social security purposes, it is difficult to understand how meals and a bed furnished in mess house and bunk house to an Alaska fisherman can be something essentially different.

The following decisions although arising under income tax laws, are nevertheless directly in point:

*Bennett v. Commissioner*, Board of Tax Appeals Docket No. 104524 entered October 28, 1942;

*Anderson v. Commissioner*, Board of Tax Appeals Docket No. 108953 entered December 18, 1942;

*Clifford Jones v. The United States*, 60 Court of Claims 552.

In the *Bennett* case Mrs. Bennett was employed as a matron and housekeeper at a sanatorium operated for the treatment of mental patients. Her duties required that she and her husband continuously reside at the institution. The taxing authorities determined that the quarters and meals so furnished had a value



of \$2,400.00 a year and that value was taxable as income. In holding to the contrary, the Board in its opinion said,

“Where an employee, for the convenience of his employer and as a necessary and essential incident to the proper performance of his duties, receives living quarters and meals from the employer, the value thereof does not constitute taxable income to the employee.”

The *Anderson* case was one involving a hotel manager whose duties required that he live at the hotel. In the findings of fact of the Board, it was said,

“Petitioner’s residence at the hotel was not for his personal convenience, comfort or pleasure, but for the purpose of enabling him to perform his work efficiently \* \* \*.”

On the authority of prior cases quoted in the opinion, the value of the board and lodging was held not to be additional wages or salary.

In *Clifford Jones v. The United States* the Court of Claims held that (quoting syllabus) :

“Quarters furnished to officers of the Army in kind and commutation of quarters paid to them where quarters can not be furnished in kind, are allowances and not compensation within the meaning of the laws of Congress imposing the income tax.”

The decision is too long to be quoted in full and excerpts from it would not fairly represent the views of the Court. It is sufficient to say, however, that the question is examined at great length both on principle and authority, and it is shown conclusively that in no proper sense can such allowances be regarded as income, wages or salary.

**PACIFIC ALASKA SALMON COMPANY, a corporation,  
v. UNITED STATES, No. 397, in District Court**

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In this case the District Court had jurisdiction and this Court has jurisdiction on appeal by virtue of the same sections of the Judicial Code referred to in the preceeding brief filed in the companion case of Pacific American Fisheries, Inc., Appellant. The case involves the same questions of law arising out of entirely similar facts submitted to the Trial Court on similar pleadings.

Complaint (Transcript 24), Answer (Transcript 31), Findings of Fact and Conclusions of Law (Transcript 34-42), Judgment (Transcript 42-43). The Complaint states three causes of action. The first cause of action covers the operations of this appellant during the season of 1937, the amount claimed being \$621.67 with interest. The second cause of action involves the operations of this appellant during the 1938 season, the amount claimed being \$595.45 with interest. The third cause of action covers the operations of this appellant during the 1939 season, the amount claimed being \$573.58 with interest.

Fred W. Tegtmeyer, an official of Alaska Pacific Salmon Company familiar with its operations in 1937, 1938 and 1939, testified in substance as follows:

**Drier Bay**

Drier Bay is located on Knight Island in Prince William Sound approximately 75 miles west of Cordova. A fishing operation only was carried on in 1937. We did not operate the cannery or pack fish there. Five floating traps were operated and the fish

hauled to another cannery for packing. The company owned a cannery at Drier Bay, but did not operate it in the year 1937. The men employed at Drier Bay in 1937 were all employed in connection with the operation of the traps with the exception of a watchman at the cannery. The number of men employed was approximately 30. While on shore they were housed and fed by the company at the bunk house and mess house. While not on shore, they were housed and fed on the boats or gear scow by the company. There were no means of housing or feeding the men otherwise than was done. The season at Drier Bay extended from April 1 to September 1. There were no other accommodations nearer than Cordova 70 miles distant and it was not practical to have the men live at Cordova and work on these traps. The operations on the traps from day to day were irregular and that factor had relation to the necessity of having the men on the job available at all times. The company did not operate at Drier Bay in 1938 or 1939 (Transcript 81-83).

### **Sand Point**

The company had an operation at Sand Point in all three years. The operation carried on in 1937 was substantially identical with that carried on in the two succeeding years. Sand Point is about 300 miles east of Dutch Harbor in the Shumagin Islands and about 10 miles distant from the Shumagin or Squaw Harbor plant of Pacific American Fisheries, Inc. The operation carried on by Alaska Pacific Salmon Company at Sand Point was substantially identical with the operations at King Cove and Shu-

magin as described by Mr. Mowry. That was true as to the housing and feeding of the men. The daily operation was irregular. The season at Sand Point is from the 1st of April to the 1st of September. About 180 men are normally employed. The normal pack at Sand Point is about 125,000 cases. The company supplies board and lodging at Sand Point because there are no other accommodations available for employees, and it would not be practical for the operation to be carried on at all if the board and lodging were not supplied by the company itself. At Sand Point no medical aid is furnished but we have a joint agreement with the Pacific American Fisheries to call on their doctor at Squaw Harbor. It would not be possible for the men to furnish their own food and lodgings (Transcript 83-85).

### **Kake, Port Althorp and Rose Inlet**

The remaining canneries operated by the Alaska Pacific Salmon Company, Inc., were located at Kake, Ketchikan, Port Althorp and Rose Inlet in southeastern Alaska and all were operated in 1937, 1938 and 1939. Kake is located about 60 miles west of Petersburg the nearest established settlement. That operation is carried on in all essential particulars as the Pacific American Fisheries, Inc., operations at Kasaan and Petersburg described by Mr. Mowry. The fish are caught in the same way, the cannery operated in the same way, and the sustenance and lodging furnished in the same way and for the same reasons.

What I have said about Kake would apply equally to Port Althorp and Rose Inlet. Port Althorp is lo-



cated about 120 miles west of Juneau and about 70 miles north of Sitka. Rose Inlet is located about 60 miles west of Ketchikan (Transcript 88-89).

### **Ketchikan**

The operation of Alaska Pacific Salmon Company at Ketchikan is substantially identical with the Pacific American Fisheries, Inc., operation at Petersburg as described by Mr. Mowry. The men are fed and housed in substantially the same way and for the same reason. The canneries of Alaska Pacific Salmon Company are all located on land. There are no floating canneries (Transcript 90-91).

## **SPECIFICATIONS OF ERROR**

In the case of *Alaska Pacific Salmon Company, a corporation, plaintiff, v. United States of America, defendant*, No. 397 in the District Court, the District Court erred:

### **I.**

In entering Findings of Fact (Transcript 34-41), Conclusions of Law (Transcript 41) and Judgment (Transcript 41-43) in favor of the defendant and dismissing the complaint.

### **II.**

The Trial Court erred in failing to find that board and lodging furnished by Alaska Pacific Salmon Company, a corporation, to its employees in Alaska during the operating seasons were furnished for the convenience of the employer and the value thereof, therefore, was not taxable as wages paid to its employees.

## ARGUMENT

The appeal of Alaska Pacific Salmon Company is submitted on the argument already made in the companion case entitled *Pacific American Fisheries, Inc., a corporation, Appellant, v. United States of America, Appellee*. Both judgments should be reversed with directions to award appellants' recoveries as prayed for in their respective complaints.

Respectfully submitted,

KERR, McCORD & CAREY

STEPHEN V. CAREY

*Attorneys for Appellants,  
Pacific American Fisheries,  
Inc., a corporation, and  
Alaska Pacific Salmon Com-  
pany, a corporation.*

Seattle, Washington.  
1309 Hoge Building,



